In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1007

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS, THE UNITED STATES, THE ATTORNEY GENERAL, AND MEMBERS OF ARBITRATION BOARD NO. 282, IN OPPOSITION

Petitioner, a railroad labor organization, seeks review of the same decision of the court of appeals of which three other railroad labor organizations are seeking review in No. 935, *Brotherhood of Locomotive Firemen and Enginemen* v. *Certain Carriers, etc., et al.* The decision upheld the Award of the special arbitration board created by Public Law 88-108, 77 Stat. 132, to arbitrate two issues in the dispute between the nation's railroads and the railroad labor

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organizations representing their operating employees: (1) the need for firemen on freight and yard locomotives, and (2) the composition of train crews. Unlike the petitioners in No. 935, however, the petitioner in the present case never sought a three-judge court, and expressly declined to join in the motion therefor (J.A. 329). Other than that, the issues raised in the two cases are basically the same, and most of petitioners' contentions in the present case are fully answered in our brief in opposition in No. 935. Accordingly, we answer here only those contentions not made in No. 935.

1. As we understand it, the main point of the petitioner's constitutional argument (Pet. 23–30), like that of petitioners in No. 935, is that Public Law 88–108 did not furnish the arbitration board adequate standards for the resolution of the two issues submitted to it for decision. For the reasons set forth in our brief in opposition in No. 935 (pp. 19–24), this contention is without substance.

In addition, petitioner suggests that the "partisan, nonrepresentative composition of the board" denied it "due process" of law (Pet. 33–34). But the balance of the decision-making power on the arbitration board was held by three disinterested neutral members, who were appointed by the President and were paid by the United States Government. Section 2, Public Law 88–108, 77 Stat. 132–133, Pet. App. 2a–3a. There was therefore no delegation of power to an interested majority "to regulate the affairs of an unwilling minority." Compare *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311.

Petitioner also argues that the Arbitration Board, after having found, on the basis of an adversary hearing in which petitioner took part, that more than 90 percent of all fireman positions are unnecessary (J.A. 54–58, 66–67), could not constitutionally provide that the actual designation of the individual positions on the basis of safety, adequate service, and burden of work (J.A. 12–13) should be made by the persons most directly affected, the railroads and representatives of the firemen, without the participation of the engineers (Pet. 30–31). But an engineer obviously has no constitutional right to participate in the determination whether he should have the assistance of a fireman on a particular run. See *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 533, 535–537. Indeed, petitioner cannot be serious about the claim for it is a reject of the separate craft units in which it, like other railway labor organizations, has bargained and arbitrated for over half a century.

2. Petitioner contends (Pet. 36–39) that in regard to the elimination of fireman (helper) issue, the Arbitration Board departed from its statutory obligations under Section 3 of Public Law 88–108, 77 Stat. 133 (Pet. App. 3a) to incorporate in its award "any matters on which it finds the parties were in agreement," and to give "due consideration to those matters on which the parties were in tentative agreement." On this aspect of the dispute, however, the Board found that there was neither "agreement" nor "tentative agreement," but only "hopeless disagreement on the

crucial questions" (J.A. 50–52, 61). This finding, as all the judges below agreed, was supported by substantial evidence (J.A. 135, 137–138, 150, 194, 214, 224).[1] The Board was therefore well within the limits of its authority in refusing to incorporate in its Award suggestions which had been discussed, but on which no agreement had been reached; and the courts below were clearly correct in so holding. In any event, since Public Law 88–108, 77 Stat. 132, has no application other than to the two issues as to which it provides for a determination binding for only two years, the statutory issues are not of sufficient general importance to warrant review by this Court.

CONCLUSION

For the reasons set forth above and in our brief in opposition in No. 935, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

APRIL 1964.

[1] Petitioner now asserts that, before the passage of Public Law 88–108, the parties "were close to an agreement" when they "were talking about a designation of some 16 per cent" as a limit of the firemen assignments to be eliminated (Pet. 29–30). The Arbitration Board found, however, that "there was absolutely no agreement by the carriers to the organizations' proposal that there should be an overall limitation on the number of firemen's jobs that might, for any reason, be eliminated" (J.A. 51–52). Indeed, the Secretary of Labor believed that the disagreement on this matter was one of the three major disagreements which separated the parties on the fireman (helper) issue (J.A. 136–137).

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